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## Rent Control: A Practical Guide for Tenant Organizations

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## ONE TIER BEYOND RAMAPO: OPEN SPACE ZONING AND THE URBAN RESERVE\*

*Using a proposal prepared for the City of San Diego as a model, the writer discusses growth management control of urban fringe land. Particular attention is given to the taking issue presented by the effort to delay development on the outskirts of a city for many years. Modification of existing legislation is recommended to clarify California's open space provisions and to facilitate the use of open space zoning to guide urban growth. The discussion concludes with a commentary on the daring new approaches two courts have recently taken which tend to establish a middle ground between non-compensable regulation under the police power and just compensation under the power of eminent domain.*

Our cities are growing. Year after year people migrate to urban metropolitan areas. In some instances, the resultant need for housing is critical.<sup>1</sup> The logical response to increased demand for housing is accelerated residential building. Unfortunately, however, the solution to one problem soon creates another: Open space on the urban fringe rapidly dwindles as housing shrouds the land.

The challenge of managing urban growth while simultaneously preserving open space can be met only through careful planning. Such planning can be divided into two categories: planning for the permanent preservation of open space for parks and other long term uses, and planning for the temporary preservation of open space which is a byproduct of the successful management of urban growth. The first type of open space preservation has been discussed at length elsewhere.<sup>2</sup> This Comment explores the second.

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\* The author wishes to express her sincere gratitude to Professor John Winters, Professor Paul Horton, and Associate Dean Herbert Lazerow for their guidance and assistance in the preparation of this Comment.

1. L.A. Times, Mar. 5, 1978, § 8, at 1, col. 1.

2. See, e.g., Eveleth, *An Appraisal of Techniques to Preserve Open Space*, 9 VILL. L. REV. 559 (1964); Roe, *Innovative Techniques to Preserve Rural Land Resources*, 5 ENV'T'L AFF. 419 (1976); Yannacone, *Agricultural Lands, Fertile Soils, Popular Sovereignty, the Trust Doctrine, Environmental Impact Assessment and the Natural Law*, 51 N.D. L. REV. 615 (1975); Comment, *Development Rights Transfer in Livermore: A Planning Strategy to Conserve Open Space*, 5 GOLDEN GATE L. REV. 191 (1975).

Several states, including California, have recognized the importance of preserving open space. To that end the California legislature has enacted many statutes fostering open space preservation at the local level.<sup>3</sup> These statutory provisions can be coordinated with local zoning ordinances to enhance the effective control a city can exercise over residential growth. One very resourceful scheme for maximizing the reach of municipal regulation of open space land has been developed for the City of San Diego by Professor Robert H. Freilich.<sup>4</sup>

Professor Freilich's method coordinates tax incentive programs with zoning ordinances to increase the likelihood that courts will sustain under the police power stringent regulations of the use of land. The method can be employed to help prevent the premature development of land on the outskirts of a city, an area known by planners as the urban fringe or urban reserve.

This Comment uses the San Diego proposal as a model to examine techniques for the conservation of open space land through the establishment of an urban reserve. Particular attention is given to the taking issues which must be circumvented if the program is to be successful. The writer suggests modification of the California open space legislation and commends several new approaches taken by courts in both California and New York.<sup>5</sup> These approaches entail the establishment of a middle way<sup>6</sup> be-

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3. See generally CAL. CONST. art. 13, § 8; CAL. GOV'T CODE §§ 16100-16101, 16140-16154, 16170, 51050-51055, 51070-51073, 51075, 51080-51087, 51090-97, 51200-51205, 51220, 51230-51249, 51251-51253, 51280-51285, 51290-51295, 65300-65307, 65350-65361, 65400-65402, 65450-65452, 65500-65507, 65550-65553, 65560-65564, 65566-65568, 65570, 65700, 65800, 65803-65804, 65850-65863.5, 65910-65912 (West Supp. 1977); CAL. REV. & TAX. CODE §§ 421-424, 426-430.5 (West Supp. 1977).

4. Professor Robert H. Freilich is the Hulen Professor of Law in Urban Affairs at the University of Missouri-Kansas City School of Law and the Director of the Urban Legal Affairs program of the Law School. He also edits *The Urban Lawyer* and is Chairman of the Section of Local Government of the Association of American Law Schools. He has been a consultant on growth controls and land use to Kansas City, Missouri; Fairfax County, Virginia; Hollywood, Florida; Rockland County, New York; Honolulu, Hawaii; and the Metropolitan Council, Minneapolis-St. Paul. He is the author of a volume on national model regulations for the control of land subdivision which was published in conjunction with the American Society of Planning Officials. Professor Freilich is a member of both the Missouri and the New York Bars and was a partner in a New York law firm specializing in municipal and land-use law for ten years. He served as counsel for defendant in the nationally prominent case of *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972), in which the New York Court of Appeals upheld the constitutionality of timing and sequencing controls in zoning. R. FREILICH, A FIVE-TIERED GROWTH MANAGEMENT PROGRAM FOR SAN DIEGO i-ii (1976) [hereinafter cited as GROWTH MANAGEMENT PROGRAM].

5. See *Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976); *Penn Central Transp. Co. v. City of New York*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 98 S. Ct. 2646 (1978).

6. See generally Berger, *The Accommodation Power in Land Use Controversies*:

tween non-compensable regulation under the police power and just compensation under the power of eminent domain.

#### THE FIVE-TIERED PROPOSAL FOR GROWTH MANAGEMENT CONTROL

Under the program proposed for San Diego,<sup>7</sup> all land situated within the boundaries of the central city is to be placed in one of five tiers.<sup>8</sup> Tier I is the downtown core—the heart of financial, governmental, and entertainment activities. Tier II includes the older, established residential neighborhoods. Incentives are offered in these two tiers to encourage the development of vacant land and the redevelopment of land not presently utilized at maximum efficiency.<sup>9</sup> A capital improvements program will be undertaken to provide community facilities to these areas,<sup>10</sup> and impact fees will be reduced or eliminated.<sup>11</sup>

Tier III embraces areas presently in a stage of active development. Land in Tier III will be allowed to develop in three sequential phases<sup>12</sup> as the city is able to provide community facilities such as roads and sewers. Development will proceed in a staged, contiguous fashion or, alternatively, in large development units.<sup>13</sup> In contrast to the approach taken in Tiers I and II, the burden of providing facilities in Tier III will be placed on the developer, through impact fees, or on the homeowner, through special assessment districts.<sup>14</sup>

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*A Reply to Professor Costonis*, 76 COLUM. L. REV. 799 (1976); Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021 (1975); Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402 (1977).

7. For a discussion of the numerous issues raised by the proposed Growth Management Program, see J. Winters, *An Independent Legal Analysis of "A Growth Management Program for San Diego"* (April, 1978) (Institute of Public and Urban Affairs, San Diego State University).

8. A "tier" is a term used by planners to refer to a planning area. Separating a city into tiers helps planners group areas of a city having similar planning requirements.

9. GROWTH MANAGEMENT PROGRAM, *supra* note 4, at 2-8; San Diego City Planning Department, *Planning Report: Growth Management Element* (Feb. 10, 1978) (on file with the *San Diego Law Review*) [hereinafter cited as *Planning Report*].

10. *Planning Report*, note 9 *supra*.

11. *Id.*

12. See GROWTH MANAGEMENT PROGRAM, *supra* note 4, at 4-15.

13. *Id.*, at 5-1.

14. *Planning Report*, note 9 *supra*.

Tier IV is the urban reserve: potentially developable land on the urban fringe which will be restricted from development until at least 1995. Tax relief will be provided for some of this land through the Williamson<sup>15</sup> and Open Space Easement<sup>16</sup> Acts.<sup>17</sup> The purpose of this urban reserve is to "preclude premature development and allow urbanization to be guided."<sup>18</sup>

Tier V is an overlay tier—land carved from the other four tiers for special protection.<sup>19</sup> Tier V includes parks, environmentally sensitive land, and other open space land<sup>20</sup> which is to be permanently preserved.<sup>21</sup> This land is to be regulated by development controls where possible. Outright purchases will be financed by special assessment districts.<sup>22</sup>

One of the primary objectives of the proposed San Diego program is to discourage new development at the suburban fringe while encouraging it at the urban core. Such redirection is designed to help prevent leapfrog development, urban sprawl, and concomitant decay of the downtown area.<sup>23</sup>

#### THE TIER BEYOND RAMAPO

The concept of using zoning to phase development so that it coincides with a city's ability to provide community facilities first received judicial approval in *Golden v. Planning Board of Ramapo*.<sup>24</sup> However, the San Diego proposal carries the tier system one step beyond what the New York Court of Appeals approved in *Ramapo*. This additional step is the fourth tier—open space land held in an urban reserve with no potential for subdivision-type development until at least 1995.

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15. CAL. GOV'T CODE §§ 51200-51205, 51220, 51230-51249, 51251-51253, 51280-51285, 51290-51295 (West Supp. 1977).

16. *Id.* §§ 51050-51065 (West Supp. 1977).

17. GROWTH MANAGEMENT PROGRAM, *supra* note 4, at 4-22 to -31.

18. Planning Report, *supra* note 9, at 5.

19. GROWTH MANAGEMENT PROGRAM, *supra* note 4, at 2-10 to -11.

20. The open space land designated for preservation in Tier V includes floodplains, extreme slopes, earthquake fault zones, geologic hazard areas, areas required for the protection of water resources and air and water quality, natural resource areas, and areas needed to link or to protect other open space lands. *Id.*, at 3-6 to -9.

21. *Id.*, at 3-1.

22. Planning Report, note 9 *supra*.

23. See GROWTH MANAGEMENT PROGRAM, *supra* note 4, at 2-1 to -2.

24. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). This case has been the subject of many commentaries. See, e.g., Bos-selman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 FLA. ST. U.L. REV. 234 (1973); Note, *A Zoning Program for Phased Growth: Ramapo Township's Time Controls on Residential Development*, 47 N.Y.U. L. REV. 723 (1972); Note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development*, 26 STAN. L. REV. 585 (1974).

The Ramapo scheme was grounded on a three-phased plan. Each phase involved a six-year period of development. The plan called for sequential development of the three phases over an eighteen-year period. A corresponding eighteen-year program for the township's provision of community facilities was adopted.<sup>25</sup> The town conditioned the grant of a special permit required for the residential-development use of land on the availability of these facilities. A point system was devised to measure the quality and kind of facilities available to particular parcels of land.<sup>26</sup> When the township's capital improvements program reached the subject property, the developer would receive enough points to be granted the special permit. Alternatively, if he wished to develop land which the capital improvements program had not yet reached, he could himself supply enough facilities to earn the number of points required for approval.<sup>27</sup>

In its review of the Ramapo scheme, the New York Court of Appeals stressed the importance of the township's commitment to its capital improvements program. In a footnote the court stated that if the township defaulted, the landowner could seek relief and could have the ordinance declared unconstitutional as applied to his property.<sup>28</sup>

The San Diego proposal resembles the Ramapo program in its provision for phased development which is linked to the sequenced provision of capital improvements to Tier III. However, the San Diego scheme is significantly different because it lacks a program for the provision of capital improvements to the Tier IV urban reserve land. Furthermore, the San Diego proposal contains no provision allowing the developer himself to provide services to his Tier IV land in order to accelerate development.<sup>29</sup>

As a matter of policy, the City of San Diego is not attempting to stop all development. Instead, the Growth Management Program attempts to ensure "that urban growth will occur in logically defined increments phased with and/or adjusted to the City's capacity to accommodate growth."<sup>30</sup> Growth which might have occurred

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25. *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 367, 285 N.E.2d 291, 295, 334 N.Y.S.2d 138, 144, *appeal dismissed*, 409 U.S. 1003 (1972).

26. *Id.* at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 144.

27. *Id.* at 368-69, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

28. *Id.* at 373 n.7, 285 N.E.2d at 298 n.7, 334 N.Y.S.2d at 148 n.7.

29. See GROWTH MANAGEMENT PROGRAM, *supra* note 4, at 4-1 to -32.

30. Planning Report, *supra* note 9, at 2.

prematurely in Tier IV is to be redirected to the other three tiers. Theoretically, it is neither logical nor feasible to allow urban expansion into Tier IV until at least 1995.<sup>31</sup> But the addition of this new tier to the familiar Ramapo system must be managed with great caution to avoid triggering the taking issue.

#### THE CALIFORNIA OPEN SPACE LEGISLATION

The California legislature has enacted a number of provisions to encourage the preservation of open space at the local level.<sup>32</sup> Each city or county is required<sup>33</sup> to adopt a general plan.<sup>34</sup> The general plan must include an open space element.<sup>35</sup> The open space element of the general plan, also known as the open space plan,<sup>36</sup> must include an action program<sup>37</sup> consisting of specific means for implementing the open space plan. All general law cities<sup>38</sup> must also adopt an open space zoning ordinance<sup>39</sup> consistent with the open space plan. Although chartered cities are not required to adopt an open space zoning ordinance,<sup>40</sup> any regulatory action taken in regard to open space land must be consistent with the open space plan.<sup>41</sup> Neither general law nor chartered cities may issue building permits or approve subdivision maps unless the proposed building or subdivision is consistent with the open space plan.<sup>42</sup> General law cities or counties which have adopted a specific plan<sup>43</sup> for implementing their open space plans are subject to a further consistency requirement relating to the construction of streets, sewers, other connections, or public buildings.<sup>44</sup> A chartered city must amend its charter or adopt an ordinance to secure the same degree of coordination.<sup>45</sup>

The definition of open space in the Open Space Lands Act<sup>46</sup> is

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- 31. GROWTH MANAGEMENT PROGRAM, *supra* note 4, at 4-1.
  - 32. See note 3 *supra*.
  - 33. CAL. GOV'T CODE § 65300 (West 1966).
  - 34. For a detailed discussion of the general plan requirement, see Perry, *The Local "General Plan" in California*, 9 SAN DIEGO L. REV. 1 (1971).
  - 35. CAL. GOV'T CODE § 65302(e) (West Supp. 1977).
  - 36. See *id.* § 65560(a).
  - 37. *Id.* § 65564.
  - 38. For a discussion of the differences between general law and chartered cities in California, see 2 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 4.83 (1966).
  - 39. CAL. GOV'T CODE § 65910 (West Supp. 1977).
  - 40. *Id.* § 65803 (West 1966).
  - 41. *Id.* § 65566 (West Supp. 1977).
  - 42. *Id.* § 65567.
  - 43. Specific plans include all detailed regulations necessary to implement the general plan. See *Id.* § 65451.
  - 44. *Id.* § 65553.
  - 45. *Id.* § 65700.
  - 46. Section 65560(b) of the Open Space Lands Act provides:

employed for the purposes of most open space legislation. This definition is important because it limits the kinds of land which can be included in the open space plan.<sup>47</sup> Once a particular parcel of land is justifiably included in the plan, numerous other provisions come into effect and assure implementation through both the requirement for an action program<sup>48</sup> and all the "consistency" requirements.<sup>49</sup>

According to the definition, open space land is land which is essentially unimproved and devoted to an open space use.<sup>50</sup> The open space uses listed include open space used for the managed production of resources<sup>51</sup> and open space for outdoor recreation, including areas of outstanding scenic value and areas particularly suited for park and recreation purposes.<sup>52</sup>

Professor Freilich suggests that establishing the relationship of urban reserve land to the open space plan is "central to support-

"Open space land" is any parcel or area of land or water which is essentially unimproved and devoted to an open-space use as defined in this section, and which is designated on a local, regional or state open-space plan as any of the following:

(1) Open space for the preservation of natural resources including, but not limited to, areas required for the preservation of plant and animal life, including habitat for fish and wildlife species; areas required for ecologic and other scientific study purposes; rivers, streams, bays and estuaries; and coastal beaches, lakeshores, banks of rivers and streams, and watershed lands.

(2) Open space used for the managed production of resources, including but not limited to, forest lands, rangeland, agricultural lands and areas of economic importance for the production of food or fiber; areas required for recharge of ground water basins; bays, estuaries, marshes, rivers and streams which are important for the management of commercial fisheries; and areas containing major mineral deposits, including those in short supply.

(3) Open space for outdoor recreation, including but not limited to, areas of outstanding scenic, historic and cultural value; areas particularly suited for park and recreation purposes, including access to lakeshores, beaches, and rivers and streams; and areas which serve as links between major recreation and open-space reservations, including utility easements, banks of rivers and streams, trails, and scenic highway corridors.

(4) Open space for public health and safety, including, but not limited to, areas which require special management or regulation because of hazardous or special conditions such as earthquake fault zones, unstable soil areas, flood plains, watersheds, areas presenting high fire risks, areas required for the protection of water quality and water reservoirs and areas required for the protection and enhancement of air quality.

*Id.* § 65560(b).

47. *Id.*

48. *Id.* § 65564.

49. *Id.* §§ 65553, 65566-65567, 65910.

50. *Id.* § 65566(b).

51. *Id.* § 65560(b)(2).

52. *Id.* § 65560(b)(3).



ing the legal validity of land use regulations in this area.”<sup>53</sup> He recommends incorporating all Tier IV urban reserve land into the open space plan. He asserts that this inclusion is justified<sup>54</sup> because of the land’s potential use for agricultural production<sup>55</sup> or “its importance as a mechanism to prevent premature conversion to urban uses and to help control urban sprawl.”<sup>56</sup>

That agricultural land can be included in the open space plan is clear from the language of the Open Space Lands Act.<sup>57</sup> However, the inclusion of non-agricultural land in the open space plan is questionable under the relevant definition. Professor Freilich asserts that such land can be included in the open space plan and supports his assertion with the following legislative finding and declaration from the Open Space Lands Act: “[D]iscouraging premature and unnecessary conversion of open-space land to urban uses is a matter of public interest and will be of benefit to urban dwellers because it will discourage noncontiguous development patterns which unnecessarily increase the costs of community services to community residents.”<sup>58</sup> Given this finding and the very broad definition of open space land in the Act, Professor Freilich concludes that Tier IV land can be incorporated in the open space plan.<sup>59</sup> Once this incorporation is accomplished, implementation of the plan is assured via the action program<sup>60</sup> and consistency requirements.<sup>61</sup>

The broad definition of open space given in the Open Space Lands Act has not yet received judicial interpretation. Some urban reserve land will be zoned for large lots allowing one dwelling unit per five or ten acres.<sup>62</sup> A five-acre lot with a home on it may not qualify as being “essentially unimproved.” Furthermore, land unsuitable for agriculture may not always qualify as an area of outstanding scenic value or as an area particularly suited for park and recreation purposes.

If the legislature indeed intends for the open space element of general plans to include certain open space land on a temporary basis for the purpose of managing the location and timing of urban growth, it should so provide. Although the statement of find-

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53. GROWTH MANAGEMENT PROGRAM, *supra* note 4, at 4-1.

54. *Id.*, at 4-5.

55. See CAL. GOV’T CODE § 65560(b)(2) (West Supp. 1977).

56. GROWTH MANAGEMENT PROGRAM, *supra* note 4, at 4-5.

57. CAL. GOV’T CODE § 65560(b)(2) (West Supp. 1977).

58. *Id.* § 65561(b).

59. GROWTH MANAGEMENT PROGRAM, *supra* note 4, at 4-1 to -4.

60. CAL. GOV’T CODE § 65564 (West Supp. 1977).

61. *Id.* §§ 65553, 65566-65567, 65910.

62. GROWTH MANAGEMENT PROGRAM, *supra* note 4, at 4-17.

ing and declaration does lend itself to this interpretation,<sup>63</sup> the definition of open space land should specifically include the prevention of noncontiguous development patterns as a permissible open space use. If the legislation stands as written, many local governments are likely to refrain from attempts to preserve open space because of a realistic fear of litigation.

### THREE TYPES OF OPEN SPACE ZONES

Open space zoning describes any type of zoning regulation used to preserve open space.<sup>64</sup> Professor Freilich recommends three specific types of zones in the San Diego urban reserve: exclusive agricultural use zones, large lot zones, and holding zones.<sup>65</sup> Each type of zone adopted must be designed to withstand challenge to its constitutionality on the ground it deprives the landowner of his property without just compensation.<sup>66</sup> Because of this threatened challenge, important considerations in employing open space zones are: What is the land's present use? Is the land suitable for the use permitted by the proposed zoning ordinance? Is there a market for the land given the proposed lot size and use limitation? These questions are frequently discussed by the courts in considering the validity of zoning ordinances as applied to particular parcels of land. Because zoning cases often turn on the factual context in which a zone is employed, this context should be examined and compared to the context of an urban reserve.

#### *Exclusive Agricultural Use Zones*

California courts have upheld exclusive use zones in numerous situations,<sup>67</sup> three of which involved exclusive agricultural use zones.<sup>68</sup> An exclusive agricultural use zone usually imposes two

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63. See CAL. GOV'T CODE § 65561 (West Supp. 1977).

64. See *id.* §§ 65560, 65910.

65. GROWTH MANAGEMENT PROGRAM, *supra* note 4, at 4-9 to -21.

66. See, e.g., *Gisler v. County of Madera*, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974).

67. See, e.g., *Consolidated Rock Prods. Co. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962); *McCarthy v. City of Manhattan Beach*, 41 Cal. 2d 879, 264 P.2d 932 (1953), *cert. denied*, 348 U.S. 817 (1954); *Mang v. County of Santa Barbara*, 182 Cal. App. 2d 93, 5 Cal. Rptr. 724 (1960); *Roney v. Board of Supervisors*, 138 Cal. App. 2d 740, 292 P.2d 529 (1956).

68. *Gisler v. County of Madera*, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974); *Paramount Rock Co. v. County of San Diego*, 180 Cal. App. 2d 217, 4 Cal. Rptr. 317 (1960); *Sladovich v. County of Fresno*, 158 Cal. App. 2d 230, 322 P.2d 565 (1958).

kinds of restrictions: minimum lot size and use limitation. The permitted uses are agriculture and uses normally deemed compatible with agriculture, such as a single-family dwelling.<sup>69</sup>

Minimum lot sizes for exclusive agricultural use zones have ranged as high as one hundred acres in California,<sup>70</sup> but apparently such restrictions have gone unchallenged in the courts.<sup>71</sup> However, a minimum lot size of eighteen acres was upheld in *Gisler v. County of Madera*<sup>72</sup> against a claim of inverse condemnation.

In *Gisler*, a 1913 subdivision plat authorized two and one-half-acre parcels for the subject property.<sup>73</sup> Nonetheless, no funds had been expended toward construction of the subdivision by the time of trial, and all the property was devoted exclusively to agricultural uses.<sup>74</sup> In upholding the eighteen-acre lot size in the exclusive agricultural use zone which was imposed in 1965, the California Supreme Court emphasized the legislative policy favoring the preservation of open space and agricultural land.<sup>75</sup> It also stressed the fact that the current use was an agricultural one.<sup>76</sup>

Two California appellate cases involving exclusive agricultural uses are *Sladovich v. County of Fresno*<sup>77</sup> and *Paramount Rock Co. v. County of San Diego*.<sup>78</sup> The *Sladovich* court upheld the zoning of land for rural residential and agricultural uses even though it was partly surrounded by industrial zones,<sup>79</sup> but the land was already being used for residential and agricultural uses. In *Paramount Rock*, the court upheld the prohibition of a rock-crushing plant in an agricultural zone.<sup>80</sup> The court noted that an attempt had been made at one time to use the subject property for farming, but it was not suited for such a use. However, the court added that "lands similarly situated in the river bed have been used for 'golf courses, dairies, riding stables, cattle grazing, etc.'"<sup>81</sup> Apparently, therefore, the land was suited to numerous other uses compatible with agriculture.

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69. F. BROADHEAD & R. ROSENFELD, OPEN SPACE ZONING HANDBOOK 104-06 (1973).

70. GROWTH MANAGEMENT PROGRAM, *supra* note 4, at 4-11.

71. *Id.*; but see *Sanfilippo v. County of Santa Cruz*, 415 F. Supp. 1340 (N.D. Cal. 1976).

72. 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974).

73. *Id.* at 303, 112 Cal. Rptr. at 919.

74. *Id.*

75. *Id.* at 307-08, 112 Cal. Rptr. at 921.

76. *Id.*

77. 158 Cal. App. 2d 230, 322 P.2d 565 (1958).

78. 180 Cal. App. 2d 217, 4 Cal. Rptr. 317 (1960).

79. 158 Cal. App. 2d at 239-40, 322 P.2d at 570-71.

80. 180 Cal. App. 2d at 217, 4 Cal. Rptr. at 317.

81. *Id.* at 223, 4 Cal. Rptr. at 320.

The problem with employing the exclusive agricultural use zone as a device to preserve open space is that it is very restrictive. Generally, large parcel sizes are required to encourage farming efficiency.<sup>82</sup> Unless farming is a reasonable use of the property, a very large parcel size coupled with an exclusive agricultural use restriction might be considered a taking.<sup>83</sup>

Furthermore, even if farming is a reasonable use of the property, the large parcel size may by itself present taking problems. Consider the impact that property taxes have in the following hypothetical. Several thousand acres of land on the outskirts of a city have been zoned for a sixty-acre minimum parcel size and exclusive agricultural use. Directly across a bordering interstate freeway, subdivision development on quarter-acre lots is occurring. As a result, the market value of the farm land rises because the buyers predict that the city will rezone the farm land to allow development. The tax assessor bases his assessment of the farm property on its fair market value regardless of the zoning restrictions.<sup>84</sup> He is required to do this by law.<sup>85</sup> Soon thereafter property taxes on the land outstrip the economic return the farmer is receiving from his use of the land. Yet the existing zoning restriction does not allow him any use of the land which will pay his property taxes. Arguably, the farmer's land has been taken without just compensation.<sup>86</sup>

### *Large Lot Zones*

The second type of open space zone is the large lot zone. Professor Freilich recommends large lot zones allowing one residential unit per five- or ten-acre lot.<sup>87</sup> A five-acre lot size is preferable to a one- or two-acre size because the smaller lot size allows too much urbanization to occur. Smaller lot sizes necessitate major

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82. F. BROADHEAD & R. ROSENFELD, *OPEN SPACE ZONING HANDBOOK* 104 (1973).

83. *Id.*

84. Zoning is not considered an enforceable restriction within the meaning of art. XIII, § 8 of the California Constitution. CAL. REV. & TAX. CODE § 422 (West Supp. 1977).

85. *Guild Wineries and Distilleries v. Fresno County*, 51 Cal. App. 3d 182, 187, 124 Cal. Rptr. 96, 99 (1975); CAL. REV. & TAX. CODE §§ 110, 110.5, 401 (West Supp. 1977).

86. F. BROADHEAD & R. ROSENFELD, *OPEN SPACE ZONING HANDBOOK* 107 (1973). See also *Brown v. City of Fremont*, 75 Cal. App. 3d 141, 145, 142 Cal. Rptr. 46, 48-49 (1977).

87. *GROWTH MANAGEMENT PROGRAM*, *supra* note 4, at 4-17.

streets, roads, schools, and other community facilities;<sup>88</sup> control of the need for these services is one of the main objectives of establishing the urban reserve in the first place.<sup>89</sup>

A large lot size is therefore desirable. However, the larger the lot-size requirement is, the more stringent the regulation. If no market for residential land in five- or ten-acre lots exists, the landowner can argue that he has no reasonably beneficial use of his property and that the regulation amounts to a taking.<sup>90</sup>

Scant authority exists regarding restrictions on minimum lot size although the use of such restrictions is widespread. In *Clemmons v. City of Los Angeles*,<sup>91</sup> the California Supreme Court recognized the validity of an ordinance "limiting the subdivision of property to certain minimum lot requirements."<sup>92</sup> In *Morse v. County of San Luis Obispo*,<sup>93</sup> a California appellate court sustained the downzoning<sup>94</sup> of plaintiff's property from a classification requiring one acre per dwelling to one requiring five acres.<sup>95</sup> The court stated that individuals are not entitled to reimbursement for losses resulting from police power regulations such as zoning<sup>96</sup> and that "some uncompensated hardships must be borne by individuals as the price of living in a modern enlightened and progressive community."<sup>97</sup>

The *Morse* court upheld a five-acre lot size. The *Gisler* court<sup>98</sup> upheld an eighteen-acre lot size. However, these cases should be distinguished factually. In *Gisler*, both the subject property and the property surrounding it were devoted exclusively to agriculture.<sup>99</sup> The *Morse* property was surrounded by small farms, but it was additionally subject to development pressure because it was located four miles from a city and one mile from an airport.<sup>100</sup>

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88. *Id.*, at 4-18.

89. *Id.*, at 1-5.

90. See *Agins v. City of Tiburon*, 80 Cal. App. 3d 225, 233-36, 145 Cal. Rptr. 476, 479-82 (1978); *Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613, 628, 129 Cal. Rptr. 575, 584 (1976).

91. 36 Cal. 2d 95, 222 P.2d 439 (1950).

92. *Id.* at 97, 222 P.2d at 442.

93. 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967).

94. To "downzone" a parcel of property means to rezone it so that the overall density potential of the parcel is decreased.

95. The case sounded in inverse condemnation. Plaintiffs had purchased the property with the expectation of getting subdivision approval; however, not only was their request for "upzoning" denied, but the property was "downzoned" instead.

96. 247 Cal. App. 2d at 603, 55 Cal. Rptr. at 712.

97. *Id.*

98. *Gisler v. County of Madera*, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974). See text accompanying notes 72-76 *supra*.

99. *Id.* at 305, 112 Cal. Rptr. at 920.

100. 247 Cal. App. 2d at 601, 55 Cal. Rptr. at 711.

Among the California cases, *Morse* apparently involves the largest lot size upheld for property subject to development pressure. Significantly, this property was suitable for agriculture as well as for homesites. The holding in *Morse* may thus be limited to its facts.

If the validity of Professor Freilich's recommendation of a five-acre large lot zone for the urban reserve is doubtful, the validity of his alternate recommendation is even more doubtful. Two California courts have frowned on open space zones with a ten-acre minimum lot size.<sup>101</sup> Both cases involved a Palo Alto ordinance restricting land in the foothills. In *Dahl v. City of Palo Alto*,<sup>102</sup> the Federal District Court for the Northern District of California held that the landowner's complaint for inverse condemnation stated a claim upon which relief could be granted.<sup>103</sup> However, in its summary of the facts, the court gave much more emphasis to the precondemnation activities<sup>104</sup> in which the City of Palo Alto had engaged than to the ten-acre lot size.<sup>105</sup> In *Eldridge v. City of Palo*

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101. See *Dahl v. City of Palo Alto*, 372 F. Supp. 647 (N.D. Cal. 1974); *Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976). A third California decision involving the same Palo Alto ordinance, *Arastra Ltd. v. City of Palo Alto*, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated*, 417 F. Supp. 1125 (N.D. Cal. 1976), held that the open space ordinance amounted to a taking. The court stated that it did not consider the ordinance to be standing alone and emphasized the importance of the city's precondemnation activities.

In a decision reached after this Comment went to press, a California appellate court held that an open space zoning ordinance with a five-acre minimum lot size did not violate the legislative intent of the state open space statutes. *Agins v. City of Tiburon*, 80 Cal. App. 3d 255, 232, 145 Cal. Rptr. 476, 479 (1978). Interestingly, the plaintiff had argued that the restrictions on its property were not stringent enough. However, with respect to a separate cause of action for inverse condemnation, the court reversed a judgment of dismissal on demurrer without leave to amend. Quoting *Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613, 628, 129 Cal. Rptr. 575, 583 (1976), the court stressed that "[w]hether a zoning restriction is so 'arbitrary,' or 'unreasonable,' or 'burdensome,' as to transcend 'proper bounds in its invasion of property rights,' is ordinarily a question of fact to be determined by trial of the issue, and not by demurrer." *Agins v. City of Tiburon*, 80 Cal. App. 3d 225, 233, 145 Cal. Rptr. 476, 479 (1978) (emphasis original). Plaintiff *Agins* had alleged both significant precondemnation activities and the lack of any reasonable remaining use.

102. 372 F. Supp. 647 (N.D. Cal. 1974).

103. *Id.* at 648-49.

104. The City of Palo Alto intended to condemn the property for a public park, but it was unable to finance the acquisition. Only after the city's attempts at obtaining the necessary financing proved fruitless were the open space zoning restrictions imposed.

105. 372 F. Supp. at 648.

*Alto*,<sup>106</sup> however, a California appellate court stated that one of the factual issues to be resolved when the matter went to trial was "whether the 10-acre homesites [were] saleable at all."<sup>107</sup> Thus, the *Eldridge* court gave substantial weight to lot size in its decision.

Although the outcome of the two Palo Alto decisions casts doubt on the validity of a ten-acre lot size in an open space zoning ordinance—particularly if the lot size renders the restricted property unmarketable—such an ordinance in an urban reserve is distinguishable. In the first place, the Palo Alto decisions rested heavily on the city's precondemnation activities.<sup>108</sup> Second, the Palo Alto restrictions were intended to be permanent. The large lot zones in an urban reserve are not. Instead, their purpose is to delay high-density development until the city has the capacity to extend its services to the urban reserve land. Third, the Palo Alto plan called for a "paths and trails system" across the subject property to allow "public access through the Foothill lands."<sup>109</sup> This system of paths arguably constitutes a "public use" requiring compensation. An urban reserve requires no such system.

Another difficulty with large lot zones is that they may be considered exclusionary.<sup>110</sup> If the overall community plan does not allow for higher-density uses to accommodate low-income families, the urban reserve becomes subject to this form of challenge.<sup>111</sup> Provisions for low-income housing and multi-family developments should be included in the other sections of the city to protect the validity of the regulations in the urban reserve and in the overall plan.<sup>112</sup>

Large lot zones have an important place in the urban reserve. They prevent undue urbanization of land which cannot be placed in an exclusive agricultural use zone because it is not suitable for agriculture. Caution must be exercised, however, not to make the lot size so large that the homesites become unmarketable.<sup>113</sup> Con-

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106. 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

107. *Id.* at 628, 129 Cal. Rptr. at 584.

108. See *Dahl v. City of Palo Alto*, 372 F. Supp. 647 (N.D. Cal. 1974); *Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

109. *Eldridge v. City of Palo Alto*, 57 Cal. App. 3d at 628, 129 Cal. Rptr. at 584.

110. See generally R. BARCOCK, *EXCLUSIONARY ZONING* (1973); Rose, *Exclusionary Zoning and Managed Growth: Some Unresolved Issues*, 6 RUT.-CAM. L.J. 689 (1975); Annot., 48 A.L.R.3d 1210 (1973).

111. *GROWTH MANAGEMENT PROGRAM*, *supra* note 4, at 4-17.

112. See *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed, cert. denied*, 423 U.S. 808 (1975). But see also *Warth v. Seldin*, 422 U.S. 490 (1975).

113. See *Agins v. City of Tiburon*, 80 Cal. App. 3d 225, 237, 145 Cal. Rptr. 476, 479 (1978); *Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613, 628, 129 Cal. Rptr. 575, 584 (1976).

trary to the recommendations of Professor Freilich, the lot size should be kept to less than five acres<sup>114</sup> for non-agricultural land. The parcel size can be larger, however, if the land is suited for agricultural as well as for residential use.<sup>115</sup>

### *Holding Zones*

The holding zone is the third type of open space zone suggested for the urban reserve. The holding zone is a "wait and see" zoning method<sup>116</sup> by which land is designated for a particular use with the expectation that the designation will be changed in time. Frequently the designation is "agricultural" or "rural residential." When the area in question develops a sufficient trend toward a particular high-density use—such as urban-residential, commercial, or industrial—the zoning is changed.<sup>117</sup>

The holding zone is sometimes referred to as an unclassified, or "U" zone. Two California cases specifically uphold this type of zone: *National Advertising Co. v. County of Monterey*<sup>118</sup> and *Castiglione v. County of San Diego*.<sup>119</sup> The *National Advertising* court struck down an ordinance requiring the removal of off-site signs not yet amortized in "U" districts, but it upheld an ordinance prohibiting construction of off-site signs in the same districts.<sup>120</sup> The court reasoned that the "U" districts were designed as holding zones "whose rural character was to be maintained only until some definite trend toward particular uses began to develop"<sup>121</sup> and that it was likely that some of the districts would develop into zones in which off-site signs would be permitted. Therefore the remedy of removal was refused because it was not clear that such a remedy either was, or would become, necessary.<sup>122</sup>

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114. A three-acre minimum lot size apparently was assumed valid by the parties in *Pratt v. Adams*, 229 Cal. App. 2d 602, 40 Cal. Rptr. 505 (1964).

115. Compare *Gisler v. County of Madera*, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974), with *Morse v. County of San Luis Obispo*, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967).

116. 1 *MANAGEMENT & CONTROL OF GROWTH* 27 (R. Scott ed. 1975).

117. See *National Advertising Co. v. County of Monterey*, 1 Cal. 3d 875, 878, 464 P.2d 33, 34, 83 Cal. Rptr. 577, 578, *appeal dismissed*, 398 U.S. 946 (1970).

118. *Id.*

119. 15 Cal. App. 3d 880, 93 Cal. Rptr. 499 (1971).

120. 1 Cal. 3d at 879-81, 464 P.2d at 35-36, 83 Cal. Rptr. at 579-80.

121. *Id.* at 878, 464 P.2d at 34, 83 Cal. Rptr. at 578.

122. *Id.*



The holding in *National Advertising* suggests that the city may not have as much regulatory control in holding zones as it would have in the other kinds of zones. Although the city could prohibit an undesirable use, it might encounter judicial resistance to eradicating a use existing prior to the imposition of the holding zone.

The *Castiglione* court upheld a "U" zone in the unincorporated territory of San Diego County.<sup>123</sup> Thus both courts upheld holding zones in areas which were *rural* in nature. The use of a holding zone within the boundaries of a central city may be questionable.

Professor Freilich recommends the use of holding zones in Tier IV urban reserve areas contiguous to Tier III areas where development is permitted. The holding zones are to be applied to those areas which might be shifted to Tier III and allowed to develop after the first five years of the Growth Management Program.<sup>124</sup> Professor Freilich recommends that the ordinance allow for "agriculture and other open space uses as of right [and] for other non-agricultural uses by conditional use permit with specific standards required."<sup>125</sup> The zoning would be changed when the community facilities had been extended to these areas.

Although the cases specifically upholding "U" zones involved rural land, it is possible that the courts would also uphold the use of the zones on the outskirts of a city. Arguably, holding zones fall within the rationale of *Ramapo*.<sup>126</sup> The restrictions involved are of much shorter duration than those involved in the other kinds of open space zones. Furthermore, development of land in the holding zones is conditioned on the ability of the city to supply community facilities. The zoning will be changed as soon as the capital improvements program extends to the subject property.

#### TAX INCENTIVE PROGRAMS

California has two programs designed to reduce property taxes on open space and agricultural land: the Williamson Act<sup>127</sup> and the Open Space Easement Act.<sup>128</sup> Professor Freilich has suggested a carefully coordinated employment of the two programs in conjunction with open space zoning. If property taxes are reduced on land in the urban reserve, it is less likely that the open space ordinances will be deemed a taking by the courts. The rea-

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123. 15 Cal. App. 3d 880, 93 Cal. Rptr. 499 (1971).

124. GROWTH MANAGEMENT PROGRAM, *supra* note 4, at 4-15.

125. *Id.*, at 4-17.

126. *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

127. CAL. GOV'T CODE 51200-51205, 51220, 51230-51249, 51251-51254, 51280-51285, 51290-51295 (West Supp. 1977).

128. *Id.* §§ 51050-51065, 51070-51073, 51075, 51080-51087, 51090-51097.

son is that a landowner whose property taxes rise above the return he receives from his land has a strong argument that his property has been taken without compensation.<sup>129</sup> Conversely, the lower the landowner's property taxes are, the more stringent the zoning restrictions can be before they amount to a taking.

### *The Williamson Act*

One of the most interesting and innovative suggestions made by Professor Freilich is his method for securing tax relief for non-agricultural urban reserve land under the Williamson Act.<sup>130</sup> This Act was adopted to encourage the preservation of agricultural, open space,<sup>131</sup> and other environmentally sensitive or economically important land through tax relief.<sup>132</sup> The Act provides for the city or county to designate an agricultural preserve, usually consisting of a minimum of one hundred acres.<sup>133</sup> Any landowner whose land is in the preserve may enter into a contract with the city or county.<sup>134</sup> This contract restricts the landowner's use of his land to agriculture. Significantly, however, he may also use it for any use designated compatible by the city council or the county board of supervisors.<sup>135</sup>

The power to designate compatible uses gives the city or county the opportunity to make non-agricultural land eligible for tax reduction benefits. Non-agricultural land can be included in the preserve if it is devoted to recreational use<sup>136</sup> or open space use.<sup>137</sup> The definitions of these two uses for the purpose of including land in the preserve are very broad.<sup>138</sup> Thus, the Williamson Act can be used to offer property tax reduction for all land in the urban reserve.

Land under a Williamson Act contract is deemed to be "en-

129. See F. BROADHEAD & R. ROSENFELD, *OPEN SPACE ZONING HANDBOOK* 107 (1973).

130. CAL. GOV'T CODE §§ 51200-51205, 51220, 51230-51249, 51251-51253, 51280-51285, 51290-51295 (West Supp. 1977).

131. K. BROWN, P. DORAN, W. MCCLURE, N. SOLOMON, & J. TARVER, *THE PROPERTY TAX AND PRESERVATION OF OPEN SPACE LAND IN CALIFORNIA: A STUDY OF THE WILLIAMSON ACT* 9-10 (1974).

132. CAL. GOV'T CODE § 51202 (West Supp. 1977).

133. *Id.* § 51220.

134. *Id.* §§ 51240-51249, 51251-51253.

135. *Id.* §§ 51238, 51243(a).

136. *Id.* §§ 15201(d), 51205.

137. *Id.*

138. *Id.* § 15201(n),(o).

forceably restricted.”<sup>139</sup> Under the California Constitution<sup>140</sup> such land must be valued for the purposes of property taxes “on a basis that is consistent with its restrictions and uses.”<sup>141</sup> The factors to be considered in assessing restricted land are set forth in the Revenue and Taxation Code.<sup>142</sup> The tax assessor is required to use the capitalization-of-income method of valuation, which results in the land’s being taxed at a percentage of the income it generates as enforceably restricted, rather than at a percentage of its fair market value.<sup>143</sup> If the land is in an area experiencing development pressure, the fair market value may be inflated due to anticipated development.

Professor Freilich suggests that the agricultural preserve designated by the city should be coextensive with the land in the urban reserve zoned for exclusive agricultural use.<sup>144</sup> Part of this land is non-agricultural land suitable for a use compatible with agriculture.<sup>145</sup> This non-agricultural open space land can be included in the preserve under the terms of the Williamson Act.<sup>146</sup> The implementation of the zoning ordinance limiting the agricultural preserve land to exclusive agricultural use or compatible uses then becomes very significant: The landowner is prevented from developing his land in any case. Because zoning is not an enforceable restriction for tax assessment purposes,<sup>147</sup> the land will still be taxed at fair market value. However, the availability of preferential tax assessment through Williamson Act contracts will reduce the persuasiveness of the landowner’s taking issue argument.<sup>148</sup> Professor Freilich contends that large blocks of land can be systematically controlled in this manner.<sup>149</sup>

### *The Open Space Easement Act of 1974*

The Open Space Easement Act of 1974 provides the other tax reduction program that can be employed in the urban reserve. This Act allows a landowner who owns open space land<sup>150</sup> to

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139. *Id.* § 51252.

140. CAL. CONST. art. 13, § 8.

141. *Id.*

142. CAL. REV. & TAX. CODE § 423 (West 1970).

143. See Comment, *The California Open-Space Easement Act: The Efficacy of Indirect Incentives*, 16 SANTA CLARA L. REV. 359, 369 (1976).

144. GROWTH MANAGEMENT PROGRAM, *supra* note 4, at 4-22.

145. *Id.*, at 4-23.

146. See CAL. GOV’T CODE §§ 51230-51239 (West Supp. 1977).

147. CAL. REV. & TAX. CODE § 422 (West Supp. 1977).

148. GROWTH MANAGEMENT PROGRAM, *supra* note 4, at 4-27.

149. *Id.*, at 4-25.

150. The Open Space Easement Act of 1974 uses the definition of open space land found in CAL. GOV’T CODE § 65560 (West Supp. 1977). See note 46 *supra*.

grant an easement in perpetuity<sup>151</sup> or for a term of not less than ten years<sup>152</sup> to the city or county in which the land is located, so long as that city or county has adopted an open space plan.<sup>153</sup> Land subject to an open space easement is deemed "enforceably restricted"<sup>154</sup> in the same way as is land under a Williamson Act contract, and it receives the same special method of valuation for property tax purposes.<sup>155</sup>

The city should offer to accept open space easements on land in both the large lot zones and the holding zones. The easement may contain whatever conditions, covenants, or restrictions are important to maintaining the open character of the land.<sup>156</sup> The use of open space easements should be an effective means of reducing taxes in the urban reserve if the zoning imposes the same restrictions as does the easement. Having no opportunity to develop their property to a high density, landowners should be willing to grant easements, just as they should be willing to enter into Williamson Act contracts.

The only exception to this general willingness might occur among landowners of property in the holding zones. Because the overall plan calls for some of the land in these zones to be shifted into Tier III and allowed to develop after the first five years of the Growth Management Program,<sup>157</sup> the landowners may prefer to gamble that their land will be that allowed to shift. Therefore they may not be willing to grant open space easements, preferring to wait in hopes of large profits from development at a later date.

### *The Open Space Subventions Act*

A city or a county planning to offer open space easements or Williamson Act contracts in the urban reserve will probably need to evaluate the potential loss in revenue from these programs.<sup>158</sup> Although the state reimburses some revenue loss to local governments under the Subventions Act,<sup>159</sup> loss resulting from accepting open space easements is specifically excepted. This lack of a state

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151. CAL. GOV'T CODE § 51075(d) (West Supp. 1977).

152. *Id.* § 51081.

153. *Id.* § 51080.

154. CAL. REV. & TAX. CODE § 422 (West 1970).

155. See text accompanying notes 139-43 *supra*.

156. CAL. GOV'T CODE § 51082 (West Supp. 1977).

157. GROWTH MANAGEMENT PROGRAM, *supra* note 4, at 4-15.

158. *Id.*, at 4-29.

159. CAL. GOV'T CODE §§ 16100-16101, 16140-16154 (West Supp. 1977).

program for reimbursement of revenue funds due to the acceptance of open space easements is a major impediment to their successful use in an urban reserve planning program. In recognition of the importance of preserving open space and managing urban growth, the state legislature should repeal the provision in the Subventions Act excepting open space easements from its coverage.<sup>160</sup>

Tax reduction programs can be used effectively in the urban reserve. When the acceptance of Williamson Act contracts and open space easements is coordinated with the imposition of open space zoning, urban growth can be managed more effectively than if the zoning is imposed separately. The reduction in property taxes resulting from the use of the Williamson or Open Space Easement Acts should help circumvent challenges based on the taking issue.

### THE TAKING ISSUE

The California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner."<sup>161</sup> The fourteenth amendment to the United States Constitution provides that no state shall "deprive any person of . . . property, without due process of law."<sup>162</sup> The fifth amendment, which applies to the federal government and to the states through the fourteenth amendment, adds: "nor shall private property be taken for public use, without just compensation."<sup>163</sup> These constitutional provisions are the source of the taking issue inherent in the establishment of an urban reserve through zoning.

Zoning ordinances, when valid, are an exercise of the police power.<sup>164</sup> To be held a valid exercise of the police power, a zoning ordinance must be reasonably necessary to promote public health, safety, and general welfare.<sup>165</sup> A strong presumption of validity exists in favor of police power regulations.<sup>166</sup> However, as

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160. *Id.* § 16141.

161. CAL. CONST. art. 1, § 14.

162. U.S. CONST. amend. XIV.

163. U.S. CONST. amend. V.

164. *Miller v. Board of Pub. Works*, 195 Cal. 477, 487, 234 P. 381, 385 (1925), *appeal dismissed*, 273 U.S. 781 (1926). See also Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971).

165. *Miller v. Board of Pub. Works*, 195 Cal. 477, 487, 234 P. 381, 384 (1925), *appeal dismissed*, 273 U.S. 781 (1926).

166. *Zahn v. Board of Pub. Works*, 195 Cal. 497, 234 P. 388 (1925), *aff'd*, 274 U.S. 325 (1927). See also Comment, *The General Public Interest vs. The Presumption of Zoning Ordinance Validity: A Debatable Question*, 50 J. URB. L. 129 (1972).

Justice Holmes formulated the general rule in the landmark case of *Pennsylvania Coal Co. v. Mahon*,<sup>167</sup> "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."<sup>168</sup>

Traditionally, the plaintiff desiring to challenge the zoning of his property has had two approaches available: (1) He could bring a suit for inverse condemnation, praying for money damages; or (2) he could challenge the validity of the ordinance as an exercise of the police power, seeking to have it held unconstitutional.<sup>169</sup>

### *Inverse Condemnation*

Few plaintiffs actually recover under a theory of inverse condemnation in regard to a zoning ordinance. However, in holding for the defendants, the courts regularly recognize that a regulation which goes too far will amount to a taking.<sup>170</sup>

The court in *Pinheiro v. County of Marin*,<sup>171</sup> a recent case involving open space zoning, reiterated the requirements for successfully stating a cause of action in inverse condemnation. One of three things must be effectively alleged: "*precondemnation activities, the lack of any remaining reasonably beneficial use, or any public use*"<sup>172</sup> of the subject property. With only a few exceptions, all California cases in which the plaintiffs have recovered are of the "precondemnation activity"<sup>173</sup> type.<sup>174</sup> One exception, *Sneed v. County of Riverside*, involved actual public use of airspace.<sup>175</sup> In a more recent exception, *San Diego Gas & Electric Co. v. City of San Diego*,<sup>176</sup> the Fourth District Court of Appeal affirmed a trial court decision awarding damages for inverse con-

167. 260 U.S. 393 (1922).

168. *Id.* at 415.

169. See *Pinheiro v. County of Marin*, 60 Cal. App. 3d 323, 326-27 nn.2 & 3, 131 Cal. Rptr. 633, 635 nn.2 & 3 (1976).

170. See, e.g., *Gisler v. County of Madera*, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974). But see *San Diego Gas & Elec. Co. v. City of San Diego*, 81 Cal. App. 3d 844, 146 Cal. Rptr. 103 (1978).

171. 60 Cal. App. 3d 323, 131 Cal. Rptr. 633 (1976).

172. *Id.* at 328, 131 Cal. Rptr. at 636 (emphasis original).

173. For a discussion of precondemnation activities, see *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 517 n.14, 542 P.2d 237, 243 n.14, 125 Cal. Rptr. 365, 371 n.14 (1975), *cert. denied*, 425 U.S. 904 (1976).

174. *Pinheiro v. County of Marin*, 60 Cal. App. 3d at 327 n.3, 131 Cal. Rptr. at 635 n.3.

175. 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963).

176. 81 Cal. App. 3d 844, 146 Cal. Rptr. 103 (1978). The *San Diego Gas & Electric* decision, published while this Comment was at press, is highly significant.

demnation to a plaintiff company that had been deprived, through the imposition of open space and other zoning regulations, of all beneficial use of its land. However, the court based its finding at least in part on the existence of precondemnation activities. Thus although the courts frequently acknowledge the landowner's right to a reasonably beneficial use of his property, no appellate-level California court has upheld an award of damages to the plaintiff *solely* because the remaining use of his property was not reasonably beneficial.

The United States Supreme Court has stated that "[t]here is no set formula to determine where regulation ends and taking begins."<sup>177</sup> In California, although several cases indicate the extent to which zoning regulations may diminish the value of the restricted property without being held a taking,<sup>178</sup> no case precisely defines where "regulation" ends and "taking begins" in terms of the remaining value of the property. The court in *HFH, Ltd. v. Superior Court*<sup>179</sup> refused to find that the downzoning of property originally purchased for \$388,000 and valued at \$75,000 after the rezoning constituted inverse condemnation. The *HFH* court stated that "a zoning action which merely decreases the market value of property does not violate the constitutional provisions forbidding uncompensated taking or damaging."<sup>180</sup>

*Sneed v. County of Riverside*<sup>181</sup> clarifies the distinction made by the courts between a diminution of value through regulation, which is not compensable, and a taking for a public use: "When private property rights are actually destroyed through the governmental action, then police power rules are *usually* applicable. . . . But, when private property rights are taken from the individual and are conferred upon the public for public use, eminent domain principles are applicable."<sup>182</sup> Thus the value of property may be diminished through downzoning until it is almost zero. So long as the land is marketable at a use compatible with the zoning, the regulating authority will have strong support for its argument that the landowner has been left with a reasonably beneficial use.<sup>183</sup>

The inverse condemnation cases of the "precondemnation activ-

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177. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

178. *See, e.g., HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976).

179. *Id.* at 508, 542 P.2d at 237, 125 Cal. Rptr. at 365.

180. *Id.* at 518, 542 P.2d at 244, 125 Cal. Rptr. at 372.

181. 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963).

182. *Id.* at 211, 32 Cal. Rptr. at 321.

183. *See Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613, 628, 129 Cal. Rptr. 575, 584 (1976).

ity" type<sup>184</sup> shared two important characteristics. First, the city or county involved expressed its intention to *acquire* the subject property through the power of eminent domain. Second, the city or county either unreasonably delayed the commencement of eminent domain proceedings, or it renounced its intent altogether.<sup>185</sup> A physical invasion of plaintiff's airspace characterized *Sneed*, the public use case.<sup>186</sup>

In establishing an urban reserve, the city should avoid the semblance of any condemnation-type activity. Furthermore, the urban reserve regulations should not allow any public use of the property. If these pitfalls are avoided, it is most likely that landowners would bring any inverse condemnation suits on the theory that they were left with no reasonably beneficial use. Although this theory is recognized by the courts, it will be extremely difficult for a plaintiff to recover damages on this basis alone.

Particular care must be taken when applying the various types of open space zones discussed in this Comment. Land unsuitable for agricultural use should not be so zoned unless it is clearly suited to a designated compatible use. The compatible use must give the landowner enough return from his land to do more than pay his taxes.<sup>187</sup> The minimum lot size in the large lot zones should be kept small enough so that the lots are marketable as homesites. If no market exists for such lots, the landowner can argue forcefully that he has no reasonably beneficial use from his property.<sup>188</sup>

### *Challenging the Validity of the Ordinance*

The second approach an aggrieved landowner may take against a zoning ordinance is to ask the court to declare the ordinance invalid or unconstitutional.<sup>189</sup> To be a valid exercise of the police

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184. For a discussion of precondemnation activities, see *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 517 n.14, 542 P.2d 237, 243 n.14, 125 Cal. Rptr. 365, 371 n.14 (1975), *cert. denied*, 425 U.S. 904 (1976).

185. See discussion in *id.*

186. 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963).

187. See *Arastra Ltd. v. City of Palo Alto*, 401 F. Supp. 962, 975-76 (N.D. Cal. 1975), *vacated*, 417 F. Supp. 1125 (N.D. Cal. 1976).

188. See *Agins v. City of Tiburon*, 80 Cal. App. 3d 225, 233-36, 145 Cal. Rptr. 476, 479-82 (1978); *Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613, 618-19, 129 Cal. Rptr. 575, 578 (1976).

189. For a discussion of the procedural methods used with this kind of challenge, see *Pinheiro v. County of Marin*, 60 Cal. App. 3d 323, 327 n.3, 131 Cal. Rptr. 633, 635 n.3 (1976).



power, a zoning ordinance must be reasonably necessary for the public health, safety, and general welfare.<sup>190</sup> The "police power" concept has never been defined in a generally accepted way.<sup>191</sup> However, the United States Supreme Court has stated: "Police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria."<sup>192</sup>

In *Golden v. Planning Board of Ramapo*,<sup>193</sup> the plaintiffs challenged the validity of the phased-development regulations. The New York Court of Appeals upheld the controls as "not violative of the Federal and State Constitutions."<sup>194</sup> As noted earlier,<sup>195</sup> two significant differences exist between the growth management schemes for Ramapo and for San Diego. First, the San Diego scheme has no program for the city to provide capital improvements to urban reserve land. Secondly, the San Diego plan has no provision enabling a landowner to accelerate the development of his urban reserve property by providing the improvements himself. However, the underlying rationale of both schemes is the same: Development is conditioned on the availability of specified services and facilities.

The difference between the restrictions in the Ramapo scheme and those in the San Diego urban reserve is a difference not of quality, but of duration. The *Ramapo* court addressed this question, but in an inconclusive manner. The court stated:

An ordinance which seeks to permanently restrict the use of property so that it may not be used for any reasonable purpose must be recognized as a taking. The only difference between the restriction and an outright taking in such a case "is that the restriction leaves the owner subject to the burden of payment of taxation while outright confiscation would relieve him of that burden" . . . . An appreciably different situation obtains where the restriction constitutes a *temporary* restriction, promising that the property may be put to a profitable use within a reasonable time. The hardship of holding unproductive property for some time might be compensated for by the ultimate benefit inuring to the individual owner in the form of a substantial increase in valuation; or, for that matter, the landowner, might be compelled to chafe under the temporary restriction, without the benefit of such compensation, when that burden serves to promote the public good . . . .<sup>196</sup>

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190. *Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454, 459, 327 P.2d 10, 14 (1958).

191. *See Berman v. Parker*, 348 U.S. 26, 32 (1954).

192. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

193. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

194. *Id.* at 383, 285 N.E.2d at 305, 334 N.Y.S.2d at 156.

195. *See* text accompanying note 29 *supra*.

196. 30 N.Y.2d at 380-81, 285 N.E.2d at 303, 334 N.Y.S.2d at 154 (quoting *Arverne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938)).

The *Ramapo* court raised more questions in regard to the duration of restrictions than it answered. It left the construction of elusive phrases such as "any reasonable purpose," "temporary restriction," and "reasonable time" to other courts. As the *Ramapo* court very correctly foresaw, "[t]he answer which *Ramapo* has posed can by no means be termed definitive; it is, however, a first practical step toward controlled growth achieved without forsaking broader social purposes."<sup>197</sup> Both the courts and the legislature must look for new approaches, compromise solutions giving fair treatment to landowners without abandoning important community goals. A few steps, hesitant and daring, have been taken in this direction.

### *New Solutions from the Courts*

Two recent decisions, one in California<sup>198</sup> and one in New York,<sup>199</sup> present novel resolutions of related conflicts. When examined together, these two decisions suggest the viability of establishing a middle way between non-compensable regulation under the police power and just compensation for the highest and best use of property under the power of eminent domain.

In *Eldridge v. City of Palo Alto*,<sup>200</sup> a California appellate court rejected the traditional remedy of invalidating a zoning ordinance so strictly regulating land that it amounted to a taking. Instead, the court held that a regulation could be concededly valid, yet nonetheless require compensation.

The *Eldridge* case involved open space ordinances with a ten-acre minimum lot size which were imposed on land in the Palo Alto foothills. Plaintiff *Eldridge* sought relief in damages for inverse condemnation. Significantly, he conceded the validity of the ordinances.<sup>201</sup>

The ordinances in question had been enacted pursuant to the Open Space Lands Act.<sup>202</sup> The *Eldridge* court interpreted Government Code section 65912, part of the Open Space Zoning Arti-

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197. *Id.* at 376, 285 N.E.2d at 301, 334 N.Y.S.2d at 150.

198. *Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

199. *Penn Central Transp. Co. v. City of New York*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 98 S. Ct. 2646 (1978).

200. 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

201. *Id.* at 628, 129 Cal. Rptr. at 584.

202. CAL. GOV'T CODE §§ 65560-65564, 65566-65568, 65570 (West Supp. 1977).

cle,<sup>203</sup> to reveal that the California legislature recognized "that an unreasonably drastic open-space zoning ordinance, although otherwise valid, may result in a taking requiring 'just compensation therefor.'"<sup>204</sup> On its face, however, the section seems to have an altogether different significance:

The Legislature hereby finds and declares that this article is not intended, and shall not be construed, as authorizing the city or the county to exercise its power to adopt, amend or repeal an open-space zoning ordinance in a manner which will take or damage private property for public use without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or of the United States.<sup>205</sup>

Clearly the Open Space Zoning Article does not authorize the use of zoning ordinances amounting to a taking without compensation. However, this is an altogether different proposition from authorizing the use of zoning ordinances amounting to a taking, so long as these ordinances include compensation. If the *Eldridge* court engaged in an autistic reading of section 65102, the reading nevertheless would represent a creative solution to the problem. So long as *Eldridge* is not overruled,<sup>206</sup> open space zoning in California will become one of the rare examples of the use of compensable regulations in the United States.<sup>207</sup>

The *Eldridge* court clearly held that "a valid zoning ordinance may nevertheless operate so oppressively as to amount to a taking, thus giving an aggrieved landowner a right to damages in inverse condemnation."<sup>208</sup> Noticeably lacking from the decision, however, is any discussion of how much compensation and what kind of compensation the landowner is to receive. These questions were addressed recently by the New York Court of Appeals in *Penn Central Transportation Co. v. City of New York*.<sup>209</sup> The solutions reached by this court are so far-reaching as to be revolutionary.

The plaintiffs in *Penn Central* were the owners of Grand Central Terminal and the lessee of the development rights over the terminal. They sought a declaration that the landmark preservation provisions of the Administrative Code of the City of New

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203. *Id.* §§ 65910-65912.

204. 57 Cal. App. 3d at 619, 129 Cal. Rptr. at 578.

205. CAL. GOV'T CODE § 65912 (West Supp. 1977).

206. See Comment, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law*, 28 HASTINGS L.J. 1569 (1977).

207. See Comment, *Compensable Regulations: Outline of a New Land Use Planning Tool*, 10 WILLAMETTE L.J. 451 (1974).

208. 57 Cal. App. 3d at 621, 129 Cal. Rptr. at 579.

209. 42 N.Y.2d 324, 325, 366 N.E.2d 1271, 1272, 397 N.Y.S.2d 914, 915 (1977), *aff'd*, 98 S. Ct. 2646 (1978).

York were unconstitutional.<sup>210</sup> In 1967 the terminal was declared a landmark by the Landmarks Preservation Commission.<sup>211</sup> Plaintiffs desired to construct a large office building over the terminal, but each of their several requests for approval were denied.<sup>212</sup> The *Penn Central* court, while recognizing that "government may not, by regulation, deprive a property owner of all reasonable return on his property,"<sup>213</sup> determined that it had two questions to resolve. First, was the government required to assure the landowner a return on that ingredient of the value of his property created not by his own efforts, "but instead by the accumulated indirect social and direct governmental investment in the physical property, its functions, and its surroundings"?<sup>214</sup> The court held the government had no such obligation. It held it would be sufficient, at least for the purposes of a landmark preservation statute, for the landowner to receive a reasonable return on the "privately created and privately managed ingredient."<sup>215</sup> The second issue was whether development rights, transferable to adjacent sites under the city ordinance, could be considered in calculating the return on the property when some of the transfer sites were owned by plaintiffs.<sup>216</sup> The court held that they could.

The *Penn Central* court carefully distinguished the landmark preservation case from a zoning case.<sup>217</sup> However, the essence of the distinction was that the government had greater regulatory powers in zoning. The court reasoned that with zoning, the landowners "burdened by the restrictions also benefit, to some extent, from the furtherance of a general community plan."<sup>218</sup>

The *Penn Central* decision is analogous to the *Eldridge* decision because both refuse to invalidate an oppressive police power ordinance and both require the landowner be compensated instead. *Penn Central* goes far beyond *Eldridge*, however, with its

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210. *Id.* at 328, 366 N.E.2d at 1273, 397 N.Y.S.2d at 916.

211. *Id.* at 329, 366 N.E.2d at 1273, 397 N.Y.S.2d at 916.

212. *Id.* at 329-30, 366 N.E.2d at 1273-74, 397 N.Y.S.2d at 916-17.

213. *Id.* at 325, 366 N.E.2d at 1272, 397 N.Y.S.2d at 915.

214. *Id.* at 323, 366 N.E.2d at 1272-73, 397 N.Y.S.2d at 916.

215. *Id.* at 324, 366 N.E.2d at 1273, 397 N.Y.S.2d at 916.

216. See generally Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 51 J. URB. L. 461 (1974).

217. 42 N.Y.2d at 326-29, 366 N.E.2d at 1273-74, 397 N.Y.S.2d at 916-17.

218. *Id.* at 329, 366 N.E.2d at 1274, 397 N.Y.S.2d at 917.

radical position on what property rights must be compensated and the form that compensation may take. Although *Penn Central's* distinction between the privately and socially created ingredients of private property will surely be subject to much criticism,<sup>219</sup> the court's manifestation of a willingness to depart from traditional concepts of eminent domain-related compensation when compensating in conjunction with a police power regulation is to be welcomed.<sup>220</sup>

#### NEW LEGISLATION FOR THE URBAN RESERVE

The California legislature has recognized the importance of "discouraging premature and unnecessary conversion of open-space land to urban uses . . . because it will discourage noncontiguous development patterns which unnecessarily increase the costs of community services to community residents."<sup>221</sup> However, the open space provisions which were presumably intended to implement this goal, among others, may be crippled for lack of more specific authority.

New legislation should be enacted to ensure that non-agricultural land suitable for little but subdivision development can be included in the open space element of a general plan. To accomplish this result, the definition of open space land<sup>222</sup> should include land which is being held in an urban reserve until some future date when development is both desirable and feasible.

The definition of open space use of land in the Williamson Act<sup>223</sup> should be amended to include specifically open space land preserved as a means of guiding urban growth. The Open Space

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219. See, e.g., Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402 (1977).

220. For a discussion of compromise solutions to the problem of compensation under the police power and the power of eminent domain, see Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799 (1976); Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975).

221. CAL. GOV'T CODE § 65560(4)(b) (West Supp. 1977).

222. *Id.*

223. "Open Space Use" is the use or maintenance of land in such a manner as to preserve its natural characteristics, beauty, or openness for the benefit and enjoyment of the public, to provide essential habitat for wildlife, or for the solar evaporation of sea water in the course of salt production for commercial purposes, if such land is within:

- (1) A scenic highway corridor, as defined in subdivision (i).
- (2) A wildlife habitat area, as defined in subdivision (j).
- (3) A saltpond, as defined in subdivision (k).
- (4) A managed wetland area, as defined in subdivision (l).
- (5) A submerged area, as defined in subdivision (m).

*Id.* § 51201(o).

Subventions program<sup>224</sup> should be amended so that the state will reimburse local governments for revenue lost because of the acceptance of open space easements.<sup>225</sup>

The Open Space Zoning Article<sup>226</sup> should also be rewritten. Although the *Eldridge* decision interprets section 65912 of this article as authorizing compensable open space zoning regulations and upholds this novel device, the decision has already been criticized as a mistake.<sup>227</sup> The section should be rewritten to authorize the use of compensable regulations with open space land. Furthermore, the legislature should clearly announce what ingredient of the property value merits compensation and how such compensation is to be calculated with reference to long-term restrictions like those appropriate to an urban reserve. Consideration should be given to the authorization of the use of transferable development rights or of other forms of non-dollar compensation to avoid undue financial strain on local governments.

The courts of California and New York have already taken daring steps toward defining a middle road between non-compensable regulation under the police power and just compensation under the power of eminent domain. The legislature should act soon to reclaim the field. The decisions, the calculations, and the compromises of competing interests require careful investigation and study. The legislature is best equipped to meet the challenge.

#### CONCLUSION

In his proposed growth management program for San Diego, Professor Robert H. Freilich has gone "one tier beyond *Ramapo*" in recommending the establishment of an urban reserve. He suggests the use of open space zoning to restrict land in the reserve from development until at least 1995. If these zoning ordinances included partial compensation for the landowner, a "middle way" could be established between non-compensable regulation under the police power and just compensation under the power of eminent domain. Recent court decisions reveal a judicial willingness to accept this kind of new approach. However, the legislature

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224. *Id.* §§ 16100-16101, 16140-16154.

225. *Id.* §§ 51050-51065, 51070-51073, 51075, 51080-51087, 51090-51097.

226. *Id.* §§ 65910-65912.

227. Comment, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law*, 28 HASTINGS L.J. 1569, 1590 (1977).

should revise some sections of the legislation relating to open space to maximize the efficient use of open space zoning as a means of guiding urban growth.

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